

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Criminal Action No. 01-23-JJF
 :
 : Civil Action No. 04-294-JJF
 ERNIE M. SCOTT, :
 :
 Defendant. :
 :

Colm F. Connolly, Esquire, United States Attorney, Richard G. Andrews, Esquire, First Assistant United States Attorney of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for Plaintiff.

Ernie M. Scott, Pro Se Defendant.

MEMORANDUM OPINION

January 7, 2005

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 88) filed by Defendant, Ernie M. Scott. Defendant's original Motion was amended by Defendant's Motion To Amend Petition 2255 To Include All Grounds (D.I. 93). In addition, Defendant has also filed a Request For A Motion For Production Of Documents (D.I. 91), a letter request for discovery related to Reginald Calhoun (D.I. 98) and a Motion For Appointment Of Counsel (D.I. 99). For the reasons discussed, Defendant's Section 2255 Motion will be denied, and his discovery requests and motion for appointment of counsel will be denied as moot.

BACKGROUND

Defendant was charged by indictment with several counts related to the passing of counterfeit checks in violation of 18 U.S.C. § 513 and 18 U.S.C. § 371. (D.I. 79 at A12). In connection with these charges, Defendant was originally represented by David Staats, Esquire. Defendant pled guilty to Count 14 of the Indictment which charged conspiracy to possess and utter counterfeit checks. (D.I. 39). Mr. Staats was then permitted to withdraw from his representation of Defendant, and Christopher Tease, Esquire was appointed to represent Defendant. (D.I. 50). Mr. Tease then filed a motion to withdraw from his

representation of Defendant, and the Court granted the motion. Thereafter, the Court appointed Raymond Radulski, Esquire to represent Defendant. Mr. Radulski represented Defendant during his sentencing and on direct appeal.

Defendant was sentenced on July 24, 2002, to 46 months imprisonment, 3 years of supervised release, \$94,156.93 in restitution and \$100 for a special assessment. Defendant appealed, and the Third Circuit affirmed his sentence. On May 18, 2004, Defendant completed his federal term of incarceration and was transferred to the custody of the State of Delaware.

By his Section 2255 Motion, as amended by his Motion To Amend Petition 2255 To Include All Grounds, Defendant raises four claims: (1) his conviction violates double jeopardy, (2) his attorney David Staats provided ineffective assistance of counsel, (3) he should have been sentenced under the 2000 sentencing guidelines, and (4) the prosecutor engaged in misconduct. The Government has filed its Response to Defendant's Motion, and therefore, this matter is ripe for the Court's review.

DISCUSSION

I. Whether An Evidentiary Hearing Is Required To Address Defendant's Claims

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the Court should consider whether an evidentiary hearing is required in this case. After a review of Defendant's Motion, the Government's response, and the record in this case,

the Court finds that an evidentiary hearing is not required. See Rule 8(a) of the Rules Governing Section 2255 Proceedings. The Court concludes that it can fully evaluate the issues presented by Defendant on the record before it. Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989) (holding that evidentiary hearing is not required where motion and record conclusively show movant is not entitled to relief and that decision to order hearing is committed to sound discretion of district court), appeal after remand, 904 F.2d 694 (3d Cir.1990), cert. denied, 500 U.S. 954 (1991); Soto v. United States, 369 F.Supp. 232, 241-42 (E.D. Pa. 1973) (holding that crucial inquiry in determining whether to hold a hearing is whether additional facts are required for fair adjudication), aff'd, 504 F.2d 1339. Accordingly, the Court will proceed to the merits of Defendant's claim.

II. Whether Defendant Is Entitled To Counsel And Discovery

Defendant has also filed a motion for appointment of counsel and several requests for discovery. A defendant has no right to be represented by counsel during habeas corpus review, and the decision to appoint an attorney rests within the discretion of the Court. Wright v. West, 505 U.S. 277, 293 (1992); Reese v. Fulcomer, 946 F.2df 247, 263-264 (3d Cir. 1991). Defendant has demonstrated an ability to represent himself as evidenced by his filing in this case. The issues presented by Defendant are not

so complex that an attorney is required to assist Defendant, and the Court has concluded that an evidentiary hearing is not required to resolve Defendant's claims. Further, the Court concludes, for the reasons that follow, that Defendant's Section 2255 Motion lacks merit. Accordingly, the Court will deny Defendant's request for the appointment of counsel.

As for Defendant's request for discovery, Rule 6 of the Rules Governing Section 2255 Proceedings provides the Court with discretion to grant discovery in a habeas case upon a fact specific showing of good cause. See e.g. Bracy v. Gramley, 520 U.S. 899 (1997). The burden of demonstrating the propriety of discovery rests on the movant.

In this case, Defendant requests discovery on anything related to Reginald Calhoun. Defendant has not set forth how this information would assist his case, and as discussed by the Court in the context of Defendant's claim of prosecutorial misconduct, Mr. Calhoun's conduct is not relevant to Defendant's case. See e.g. U.S. v. Williams, 166 F. Supp. 2d 286, 307 (E.D. Pa. 2001) (denying request for discovery where defendant has made no showing as to what the documents might reveal); U.S. v. Pelullo, 144 F. Supp. 2d 369, *381 (E.D. Pa. 2001) (denying discovery where no credible showing was made that discovery would assist defendant in proving the claims asserted in his motion).

As for the remaining discovery sought by Defendant, his

request for materials is not specific and does not identify what he seeks to obtain or how the information he requests will assist in his case. Williams, 166 F. Supp. at 307; Pelullo, 144 F.Supp. 2d at 381. Further, the Court concludes, for the reasons that follow, that Defendant's claims lack merit, and the Court is not persuaded that the discovery sought by Defendant would alter the Court's conclusion. Accordingly, the Court will deny Defendant's requests for discovery.

III. Whether Defendant Is Entitled To Relief On The Claims Asserted In His Section 2255 Motion

A. Double Jeopardy Claim

By his Motion, Defendant contends that his conviction violates double jeopardy because he was subsequently charged by the State of Delaware with crimes related to the passing of counterfeit checks, i.e. the same conduct which formed the basis of his federal conviction. Defendant contends that his state and federal charges should have been combined and included in his guilty plea to the federal charges.

As a threshold matter, the Court observes that Defendant did not raise this claim on direct appeal, and therefore, it is procedurally barred, unless Defendant can show "cause" excusing the procedural default and "actual prejudice" resulting from the error of which he complains.¹ United States v. Frady, 456 U.S.

¹ In further defining the "cause and actual prejudice standard," courts have held that cause exists where a factor

152, 165 (1982). In the alternative, the procedural bar is also excused if Defendant can establish that a miscarriage of justice will result if the court does not review his claim. Fraday, 456 U.S. at 167-170.²

Ineffective assistance of counsel can constitute cause for a procedural default. In this case, however, Defendant does not allege that his appellate counsel was ineffective. Rather, Defendant's ineffective assistance of counsel claim focuses on the conduct of his trial counsel who was present during his guilty plea and who was permitted to withdraw after his plea was entered. Accordingly, the Court concludes that Defendant has not established cause to excuse his procedural default.

However, even if Defendant can establish cause, the Court concludes that Defendant cannot establish prejudice, because his

external to the defense prevented a defendant from complying with the procedural rule, and actual prejudice exists where the alleged error actually worked a substantial disadvantage to a defendant. Kikumura v. United States, 978 F. Supp. 563, 574-75 (D.N.J. 1997) (citations omitted); Rodriguez v. United States, 866 F. Supp. 783, 785 (S.D.N.Y. 1994) (citations omitted).

² A petitioner demonstrates a "miscarriage of justice" by showing that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. "Actual innocence" is established by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. Sweger v. Chesney, 294 F.3d 506, 523-24 (3d Cir. 2002). The miscarriage of justice exception applies only in extraordinary circumstances and is appropriate only when actual innocence is established, rather than legal innocence. Sawyer v. Whitley, 505 U.S. 333, 339 (1992).

claim lacks merit as a substantive matter.³ Under the Double Jeopardy Clause, a person cannot be tried or sentenced twice for the same crime by the same sovereign. United States v. Dixon, 509 U.S. 688, 695-696 (1993). In this case, Defendant's federal charges were adjudicated before his state charges, and therefore, Defendant has not alleged any prior prosecution during which he may have already been placed in jeopardy for the federal offense for which he was convicted. See generally United States v. Smith, 82 F.3d 1261, 1266 (3d Cir. 1996) (explaining when a hearing is required in double jeopardy case and respective burdens of proof and holding that defendant must first show that "that a second indictment is for the same offense for which he was formerly in jeopardy," and then "the government must prove by a preponderance of the evidence that there were in fact separate offenses before the defendant may be subjected to trial"). Further, under the doctrine of dual sovereignty, double jeopardy does not bar a federal prosecution arising out of the same facts which form the basis of a state prosecution. United States v.

³ For the same reasons that Defendant cannot establish prejudice with respect to his claims, the Court concludes, in the alternative, that Defendant cannot establish that a complete miscarriage of justice has occurred such that he is entitled to relief. See e.g. United States v. Cepero, 224 F.3d 256, 267 (3d Cir. 2000) (recognizing that Section 2255 petitions "serve only to protect a defendant from a violation of the constitution or from a statutory defect so fundamental that a complete miscarriage of justice has occurred"). Defendant makes no claim of actual innocence, and his claim is not meritorious.

Pungitore, 910 F.2d 1084, 1105 (3d Cir. 1990); see also United States v. Trammel, 133 F.3d 1343 (10th Cir. 1998) ("It is well established that 'prosecutions undertaken by separate sovereign governments, no matter how similar they may be in character, do not raise the specter of double jeopardy as that constitutional doctrine is commonly understood'"); United States v. Guzman, 85 F.3d 823, 826 (1st Cir.), cert. denied, 117 S. Ct. 537 (1996). Moreover, to the extent Defendant has any double jeopardy claim, that claim pertains to any subsequent state proceedings against him, and therefore, that claim is properly raised in the state courts and not in this Court. Accordingly, the Court concludes that Defendant's double jeopardy claim is both procedurally barred and meritless, and therefore, Defendant is not entitled to relief.

B. Ineffective Assistance Of Counsel Claim

Defendant next contends that his counsel David Staats provided ineffective assistance of counsel. Specifically, Defendant contends that his attorney was ineffective, because he (1) refused to file Defendant's motion to dismiss his indictment as defective, (2) lied to Defendant regarding the plea agreement so that Defendant would think that his plea covered his state charges, and (3) did not ask for an evidentiary hearing concerning the monetary loss at issue. Claims for ineffective assistance of counsel are properly raised and considered for the

first time in a Section 2255 proceeding.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). The first prong of the Strickland test requires a defendant to show that his or her counsel's errors were so egregious as to fall below an "objective standard of reasonableness." Id. at 687-88. In determining whether counsel's representation was objectively reasonable, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In turn, the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound . . . strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Under the second prong of Strickland, the defendant must demonstrate that he or she was actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 692-94; Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993). To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369

(1993). Thus, a purely outcome determinative perspective is inappropriate. Id.; Flamer v. State, 68 F.3d 710, 729 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996).

In this case, Defendant contends that attorney Staats failed to file Defendant's motion to dismiss the indictment as defective. However, Defendant raised his argument concerning the indictment at sentencing, and the Court concluded that it lacked merit. (D.I. 75 at 7-10). Because counsel was not required to file a meritless motion, the Court cannot conclude that counsel was ineffective for failing to file the motion requested by Defendant.

As for his claim that attorney Staats misled Defendant into believing that his guilty plea included his state charges, the Court likewise concludes that Defendant's claim lacks merit. Defendant's claim is expressly contradicted by the record in this case, including the terms of his plea agreement and the contents of his presentence report. Defendant's plea agreement states that: "The United States Attorney for the District of Delaware agrees not to prosecute the Defendant for any other counterfeit checks that he was involved in passing between the dates of July 1, 2000 and January 4, 2001." (D.I. 39 at ¶ 4). Defendant acknowledged at the guilty plea that he was not made any promises other than those contained in the plea agreement. (D.I. 74 at 6). Further, Defendant's presentence report listed a number of

outstanding state charges against Defendant, at least five of which concerned the passing of counterfeit checks. (Revised PSR at ¶ 79-82, 84). Defendant admitted at the plea hearing and the sentencing hearing that he passed the checks (D.I. 74 at 13; D.I. 75 at 18), and Defendant has not alleged that this admission would have changed or that he would not have pled guilty if he knew his state charges were not included in the plea agreement. Accordingly, the Court concludes that Defendant cannot establish ineffective assistance of counsel on this basis.

As for his last claim concerning attorney Staats' failure to ask for an evidentiary hearing on the monetary loss resulting from Defendant's conduct, the Court observes that the issue of how much restitution was owed by Defendant was a sentencing issue. At the time of sentencing, attorney Staats was no longer representing Defendant, and therefore, attorney Staats cannot be held responsible for failing to raise this issue. Attorney Radulksi, who represented Defendant during sentencing, raised an objection to the calculation of loss, and the Court overruled his objection. Further, Defendant raised issues concerning the loss calculation on appeal, and the Third Circuit rejected Defendant's arguments. Accordingly, the Court concludes that Defendant cannot establish ineffective assistance of counsel on this basis.

C. Sentencing Guidelines Claim

Defendant next contends that he should have been sentenced

under the 2000 Sentencing Guidelines rather than under the 2002 Sentencing Guidelines. Defendant did not raise this issue at sentencing or during his direct appeal, and therefore, Defendant's claim is procedurally barred unless he can establish "cause and prejudice" to excuse his procedural default or that a miscarriage of justice will occur if the Court does not consider his claim.

As with his double jeopardy claim, Defendant has not alleged cause to excuse his procedural default. However, even if Defendant can establish cause, the Court concludes that Defendant cannot establish actual prejudice because his claim lacks merit.⁴ Under Section 1B1.11 of the Sentencing Guidelines, the Court is required to use the Guidelines Manual in effect on the date that Defendant is sentenced, unless use of that edition would violate the ex post facto clause of the Constitution, in which case, the Court must use the Guidelines Manual in effect on the date that the offense of conviction was committed. Defendant was sentenced on July 24, 2002, and therefore, the Court was required to use, and did use, the 2001 edition of the Sentencing Guidelines. Defendant has not alleged an ex post facto violation and has not explained how his sentence would have differed if a different

⁴ Because Defendant's claim lacks merit and he makes no claim of actual innocence, the Court also concludes, in the alternative, that he cannot establish that a miscarriage of justice has occurred such that he is entitled to relief. See e.g. Cepero, 224 F.3d at 267 (3d Cir. 2000).

edition of the Guidelines had been used. Further, Defendant has served the incarceration portion of his sentence, and therefore, any claim Defendant has based on his offense level under the Sentencing Guidelines is moot.

D. Prosecutorial Misconduct Claim

Defendant also alleges that the prosecutor engaged in misconduct by (1) failing to disclose information pertaining to Reginald Calhoun, whom Defendant contends was his co-defendant, (2) failing to disclose how long Dressie Wall had been under investigation, and (3) attributing a loss of \$94,156.93 to Defendant when \$47,301.77 in losses were attributed to Defendant's co-defendants. Defendant did not raise this claim at sentencing or on direct appeal, and therefore, Defendant's claim is procedurally barred, unless he can show cause and prejudice or that a miscarriage of justice will result if the Court does not consider his claim. Defendant has not asserted cause to excuse his procedural default. However, even if Defendant can demonstrate cause, the Court concludes that he cannot establish prejudice because his claim lacks merit.⁵ Reginald Calhoun is not a co-defendant in Defendant's case, and the Calhoun case was not used against Defendant. (Revised PSR at ¶ 5-22). Thus, Defendant has not set forth any basis suggesting that the

⁵ For these same reasons, the Court concludes that Defendant cannot establish a miscarriage of justice. See *infra* notes 1 & 2.

Government was required to provide Defendant with this information or that the Government's failure to do so amounted to prosecutorial misconduct. Similarly, the Government was not required to disclose how long Dressie Wall had been under investigation, and Defendant has not explained how any information pertaining to Dressie Wall would have impacted his case. For purposes of Defendant's sentence, the Court found that Dressie Wall was also a leader in the offense, and that although there may have been "some gradation" between Defendant's conduct and Ms. Wall's conduct, Defendant was also properly considered to be a leader so that a four level enhancement was warranted. (D.I. 75 at 15). In these circumstances, any information regarding the length of time Wall had been under investigation would not have altered the Court's sentencing determinations.

As for the calculation pertaining to the amount of restitution owed by Defendant, the Court concludes that Defendant has not established how this calculation, even if it was erroneous, amounts to prosecutorial misconduct. Accordingly, the Court concludes that Defendant's claim for prosecutorial misconduct is procedurally barred and meritless, and therefore, Defendant is not entitled to relief.

IV. Whether A Certificate Of Appealability Should Issue

The Court may issue a certificate of appealability only if Petitioner "has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2). In this case, the Court has concluded that Defendant is not entitled to relief because his claims are procedurally barred or otherwise meritless, and the Court is not convinced that reasonable jurists would debate otherwise. Because Defendant has not made a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

CONCLUSION

For the reasons discussed, Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody, as amended by Defendant's Motion To Amend Petition 2255 To Include All Grounds, is denied. In addition, the Court will deny Defendant's Request For A Motion For Production Of Documents, his letter request for discovery related to Reginald Calhoun and his Motion For Appointment Of Counsel.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 v. : Criminal Action No. 01-23-JJF
 :
 ERNIE M. SCOTT : Civil Action No. 04-294-JJF
 :
 Defendant. :
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O R D E R

At Wilmington, this 7th day of January 2005, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 88), as amended by Defendant's Motion To Amend Petition 2255 To Include All Grounds (D.I. 93) is DENIED.

2. Defendant's Request For A Motion For Production Of Documents (D.I. 91), letter request for discovery related to Reginald Calhoun (D.I. 98) and Motion For Appointment Of Counsel (D.I. 99) are DENIED.

3. Because the Court finds that Defendant has not made "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE